No. 89-1732

In The
Supreme Court of the United States
October Term, 1989

THOMPSON B. SANDERS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Petitioner's right to a fair trial was denied by the trial court when it permitted the government to introduce into evidence the guilty pleas of two co-defendants?

II. Whether the Petitioner's right to a fair trial was denied by the trial court when it excluded testimony of a co-defendant relevant to explaining petitioner's state-of-mind in a tape-recorded conversation with the government's informant?

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PRAYER

Petitioner Thompson B. Sanders respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Seventh Circuit up-

holding the district court's rulings admitting the government's guilty plea evidence and excluding the defendant's state of mind evidence is reported at 893 F.2d 133 (7th Cir. 1990) and attached hereto as Exhibit A.

JURISDICTION

This petition for writ of certiorari results from an opinion issued by a panel of the Seventh Circuit Court of Appeals on January 5, 1990 upholding defendant's conviction. On January 19, 1990, defendant filed a timely petition for rehearing, which was denied on February 6, 1990. This petition is filed within ninety days of the order denying the petition for rehearing and is thus timely. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF CASE

1. The Proceedings Below

On July 5, 1988, a Grand Jury returned an eleven count superseding indictment

against defendant Thompson Sanders, charging him with conspiracy and violation of the federal wire fraud and commodity statutes. Sanders was convicted after a jury trial on September 14, 1988 on all counts and his post-trial motions were denied on October 31, 1988. On November 3, 1988, he was sentenced to six years in prison and fined $300,000 and barred from the commodity industry. On November 10, 1988, the District Court found that there were substantial issues for appeal and granted defendant an appeal bond. The appeal was orally argued on September 8, 1989, before the Seventh Circuit Court of Appeals, Judges Gordon, Cummings and Posner. On January 5, 1990, the panel affirmed Sanders' convictions on all counts in a published Opinion attached hereto as Exhibit A. The Court remanded the case for correction of the sentence only. On February 27, 1990, the district court changed the prison term

portion of the sentence from six years to five years.

2. Statement Of Facts[1/]

The government's indictment in the instant case accused Tom Sanders, a member of the Chicago Board of Trade ("CBOT"), of providing a disguise and false credentials to Dan Dewey, a former member of the Exchange, to permit Dewey to enter the floor of the Chicago Board of Trade and place orders for the purchase and sale of Treasury Bond futures contracts.

Also indicted with Sanders and Dewey were Dan Kolton, who, using similar false credentials posed as Dewey's clerk to lend credibility to him, and David Pelleu, who

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1/ An extensive Statement of Facts with citations was filed by the Petitioner in his original brief on appeal before the Seventh Circuit. The fact section appearing above has been taken from Petitioner's original brief and tailored to the issues in the certiorari petition.

prepared the false credentials used by Dewey and Kolton. Prior to the indictment, David Pelleu cooperated with the government and secretly recorded telephone conversations with Dewey, Kolton and Sanders. After indictment and prior to trial, Dewey and Kolton pled guilty and testified against Sanders at the trial in this case.

The evidence showed that Dewey placed Treasury Bond futures trades which were competitively executed on May 4, 1988, July 9, 1988, and August 20, 1988 and which were put into accounts of Sanders' friends. Thereafter, the trades were transferred to Sanders' own account where they were offset by positions properly and competitively established by Sanders. On the first two dates, the trades resulted in net profits. On the third date, there was neither profit or loss.

On October 2, 1986, Dewey placed his fourth set of trades and (as is common among

members at the CBOT) received back from the filling broker the executed trading cards for processing. The trades did not clear into a customer account because the broker's cards were never turned in for processing. The broker became responsible for the trades at the market's opening the next day and made $500,000 for himself when he liquidated the positions ordered by Dewey.

The government argued that Sanders intended to walk away from any losing trades and that the purpose of the disguise was not simply to get Dewey on the floor to assist Sanders in trading treasury bonds (as the defense contended), but rather to permit Dewey from being identified by the filling broker in the event the trades went bad. Thus the government contended Sanders could engage in risk-free trading by processing the broker's trading cards on winning trades and discarding the losers, resulting in the fill-

ing broker assuming responsibility for any loss incurred (as he could not identify who gave him the order).

The government argued that that is what happened on October 2 when the trade cards were not turned in. The government argued it was simply good fortune that resulted in the market turning around at the opening on October 3 and allowing the filling broker who assumed responsibility for the trades to make $500,000 instead of being stuck with a loss.

The defense argued that Sanders did not have the intent to defraud any broker. The defense argued it was Sanders' intent to get Dewey on the floor to assist him in profitably trading treasury bonds, a contract in which Dewey had expertise and in which Sanders did not. The defense contended Sanders' plan was to place the Dewey trades in Sanders' friends' accounts and thereafter decide to which one of his own accounts he would transfer the trades which, when matched

with the positions he had established, would result in gains or losses. Sanders knew his wife's divorce lawyer was seeking money from him and was aware of certain of Sanders' accounts (where Sanders would direct the losses) but not others (where Sanders would direct the profits). The defense argued Sanders indeed had a place for losing trades and had no intent to avoid the losses; and that the failure to process the October 2, 1986 cards was due to co-defendant Pelleu's separate scheme to take the trades for himself.

All the trades that Sanders and Dewey made creating profits were done competitively and according to the rules of the Exchange. Only the transfer trades between Sanders' friends' accounts and his own were pre-arranged, but those trades had no economic impact on the transactions. No one was cheated. Thus, Sanders argued that while

breaking Exchange rules by getting Dewey on the floor in a disguise and by even violating misdemeanor statutes relating to "wash" transactions to accomplish the transfer trades, he nevertheless had no intent to defraud any broker by walking away from a transaction and thus he was not guilty of the charges in the indictment.

Throughout the pre-trial and the trial, the defense in repeated motions based upon United States v. Bryza, 522 F.2d 414, 425 (7th Cir. 1975), vigorously sought without success to exclude the guilty plea evidence of Daniel Dewey and Dan Kolton, two of Sanders' co-defendants. [Judge Bauer stated in Bryza that the fact that co-defendants have entered guilty pleas has no place in another defendant's trial (Bryza, 522 F.2d at 425).] The defense in the instant case did not want the jury to conclude that Sanders, the alleged ringleader, was guilty because two alleged co-defendants had pled guilty.

Further, Sanders' defense that he did not have the intent to defraud required under the law was irreparably damaged when co-defendants Dewey and Kolton, after their guilty pleas were admitted, testified they had no such intent to defraud. The inevitable conclusion was that lack of intent to defraud was not a defense to the charges.

The third co-defendant, David Pelleu, was the only witness at the trial who testified that Sanders, in one brief conversation he allegedly had with Pelleu, told Pelleu that he intended to walk away from a losing trade. Pelleu's credibility was severely impeached because of his failure to have previously told government agents, in eighty-nine (89) pre-trial interviews, of this conversation. Pelleu's credibility was also challenged by his own checkered past of fraud, corruption and alcohol abuse. Neither Dewey nor Kolton corroborated Pelleu's

version of the facts relating to intent, and the trading pattern itself and the disguises were as susceptible to the government's version of what happened as to the defense's version.[2/] But Pelleu had made tape recordings of conversations with his friend Sanders in January and March of 1987, three and five months, respectively, after the last trade was made in October 1986. In those conversations, Pelleu complained to Sanders that he was desperate for money and encouraged Sanders to come up with a plan whereby Pelleu

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2/ At trial, the defense attacked Pelleu's credibility and argued Pelleu was a liar and had made a deal with the government in order to avoid prosecution for twenty years of failing to file tax returns. Because Pelleu and his plea bargain was challenged, the defense did not, at trial, object to the government's introduction of its plea agreement with him. As noted above, however, the credibility of both Dewey and Kolton were not challenged by the defense, and in fact, their testimony about defendant's lack of intent to defraud was favorable to the defense. For the reasons noted above, the introduction of the guilty pleas was devastating to petitioner's chances for acquittal.

could enter the floor and trade with a disguise. The government induced Pelleu to engage Sanders in these conversations which it recorded and to make such a proposal so as to get Sanders to comment on the type of scheme that could be undertaken and hopefully refer back to the trades that had occurred the prior year which the government alleged were pursuant to a "walk-away" scheme.

The jury did not know when it heard and replayed these tapes that Sanders subsequently had a conversation with Dewey immediately after Pelleu's first call in January 1987. Sanders warned Dewey that Pelleu had just called and was desperate for money and that Dewey should, as Sanders did, give Pelleu a story and play him along. Sanders was precluded from proving that his recorded statements to Pelleu were a fiction, because the trial court did not permit the defense to introduce Dewey's testimony about

his conversation with Sanders, testimony that would have shown Sanders' state of mind at the time of his conversations with Pelleu.

REASONS FOR GRANTING THE PETITION

This Petition Should Be Granted To Uphold The Rule Of Law That A Defendant Is Entitled To A Fair Trial, Where He Can Present All Relevant Evidence In His Defense And Where Evidence Of Other Defendants' Convictions Cannot Be Used To Convict Him.

I. The Improperly Admitted Guilty Pleas.

There was reversible error when the trial court admitted the guilty pleas of the defendants, Daniel Dewey And Daniel Kolton into evidence. The Seventh Circuit in United States v. Bryza, 522 F.2d 414, 425 (7th Cir. 1975) has stated:

> Normally the fact that co-defendants have entered guilty pleas has no place in another defendant's trial.
>
> Guilty pleas of co-defendants should be brought to the attention of the jury in only certain narrow instances (footnote omitted); i.e., when it is used to impeach trial testimony or to reflect on a witness' credibility in accordance with the standard rules of evidence; where other co-defendants plead guilty during trial and are conspicuously absent; where opposing counsel has left the impression

> of unfairness which raises the issue or invites comment on the subject...
>
> In some cases this entire problem could be avoided by simply allowing counsel to bring the fact that the co-defendants were indicted, thus avoiding the impression that the government is being unfair without telling the jurors that the co-defendants had actually admitted their guilt.
>
> 522 F.2d at 425.

There was no reason to allow the government to introduce the irrelevant fact that co-defendants Dewey and Kolton pled guilty, thereby creating the inference that Sanders (the alleged ringleader) must also be guilty. Specifically, the jury must logically conclude that if lesser defendants pled guilty, then the "mastermind" was also guilty. Any other inference is illogical.

Further and most importantly, Sanders' defense that he did not have the intent to defraud required under the law was irreparably damaged when co-defendants Dewey and Kolton, who also said they had no such intent to defraud, testified on cross-examination,

that they had pled guilty. The inevitable conclusion was that lack of intent to defraud was not a defense to the charges.

The Seventh Circuit misapprehended the record when it based its decision for upholding the admission of the co-defendants' guilty pleas on the premise that the trial strategy of the defense made the admission of such evidence inevitable. Judge Gordon, in the panel opinion, states:

> The defendant claims as error the admission of the former co-defendants' guilty pleas during the government's case-in-chief. Given the trial strategy of the defense, the admission of such evidence was inevitable.

Slip. Op. at 4. In fact, as the record in this case makes clear, the defense strategy was exactly opposite that of which Judge Gordon describes.

Throughout the pre-trial and the trial, the defense in repeated motions based upon United States v. Bryza, 522 F.2d 414, 425 (7th Cir. 1975), vigorously sought without

success to exclude the guilty plea evidence of Daniel Dewey and Dan Kolton, two of Sanders' co-defendants. The defense in the instant case did not want the jury to conclude that Sanders, the alleged ringleader, was guilty because two allegedly lesser defendants had pled guilty. Next to the taped conversation between Pelleu and Sanders (discussed in Section II below) the guilty pleas of Dewey and Kolton were the most prejudicial evidence the government presented in their case against Sanders.

The introduction of the pleas became more egregious as the case developed. Defense counsel Dan Webb cross-examined both Dewey and Kolton and surprisingly they testified that they did not possess the requisite intent to defraud any of the alleged victim commodity brokers. Thus, the defendant was in the impossible position of having evidence presented that two of his co-defendants had

pled guilty without any intent to defraud and the defendant was on trial attempting to defend himself against fraud charges on the ground that he also had not possessed the requisite intent to defraud.

The introduction of the guilty plea evidence of Dewey and Kolton not only left the impression that Sanders must also be guilty but that his defense, i.e. the absence of the intent to defraud, was not a proper defense to the fraud charges since neither Dewey or Kolton had the intent to defraud yet they were also guilty.

There is absolutely nothing in the trial record that indicates the defense strategy was anything other than to prevent the introduction of the guilty pleas, and Judge Gordon in the panel's opinion provides no factual basis upon which he makes the statement that the defense strategy would allow the introduction of the guilty pleas.

The second basis for upholding the

introduction of the guilty pleas is Judge Gordon's conclusion that Bryza does not preclude introduction of the pleas but rather permits them under certain circumstances. Petitioner does not disagree with this premise. However, the "Bryza exception" circumstances do not exist here.

The first exception under Bryza is when the guilty pleas are used to impeach the trial testimony or to reflect on a witness' credibility. The defense strategy would not have involved asking Dewey and Kolton questions about their intent to defraud if that would have risked impeachment by their guilty pleas. That issue would have been resolved in a motion in limine by the trial judge before the introduction of the guilty pleas could have occurred. The second exception under Bryza is where other co-defendants pled guilty during the trial and are conspicuously absent. That did not occur in

the instant case.

The third Bryza exception is where opposing counsel has left an impression of the unfairness of prosecution of him which raises the issue or invites comment on the subject. That also did not occur in this case. There is no evidence in the record that the defense in any way created a misimpression or intended to create a misimpression that the defendants Dewey and Kolton went unpunished. In fact, throughout the pre-trial motion stage, the defense argued to the court that consistent with Bryza the court should advise the jury or should permit the prosecutor to advise the jury that Dewey and Kolton were co-defendants and had been charged with the same crimes as Sanders.

The panel next relies upon United States v. McGrath, 811 F.2d 1022, 1024 (7th Cir. 1987) as a basis for introduction of the pleas. In McGrath the defendant did not argue that the evidence of a co-defendant's

guilty plea should have been excluded altogether. Rather the defense in McGrath simply argued that the specifics of that guilty plea should not have been as extensively detailed by the prosecutor. The McGrath opinion is totally unclear as to the basis of the admission of the guilty plea details and whether or not the defense had opened the door for their admission by creating a misimpression. As noted above, it is undisputed in the instant case that the defense did not make such a misimpression here.

Judge Bauer wrote the opinions in both Bryza and McGrath. In McGrath he stated "in Bryza we held that the defendant is entitled to a limiting instruction in those cases which have approved the introduction of a co-defendant's guilty plea." 811 F.2d at 1024 (emphasis supplied). "Those cases" which have approved the introduction of a co-defendant's guilty plea are, as noted above,

not applicable here.

Judge Gordon states in the panel opinion:

> [I]n [McGrath] this court concluded that without testimony about the guilty plea the jury would be left to infer that the former co-defendant went unpunished or that Mr. McGrath was singled out for prosecution. Relying on McGrath, the district court found the same to be true in the case at bar.

Slip Op. at 5. The problem with this statement is that neither the district court nor the panel in its opinion has explained why if the jury was apprised, as defendant suggested, that defendants Dewey and Kolton had been charged they would be left with the misimpression that they had gone unpunished. Advising the jury that the defendants were charged but not advising them of the guilty pleas is exactly the procedure suggested in Bryza, 522 F.2d at 425.

The other case cited by the court, United States v. Davis, 838 F.2d 909, 918 (7th Cir. 1988), is also inopposite. In

Davis, the defendants did not object to the introduction of the guilty pleas at the time of trial. Also, the defendants in Davis case made it clear in their opening statements that they intended to attack the credibility and character of the government witnesses, thereby opening the door for the introduction of the guilty pleas. The defendants in Davis left no doubt that they intended to show that the government's witnesses (whose pleas were subsequently introduced) were unworthy of belief because the witnesses were bad people and because their agreements with the government gave them a motive to testify falsely. Davis, supra, 917-918. None of these circumstances exist here as the defense never attacked either Dewey or Kolton's credibility or character.

Judge Gordon lastly relies upon the instruction by the court to the jury:

> [M]oreover, their (Dewey and Kolton's guilty pleas) are not to be considered as evidence against the defendant.

Slip. Op. 5. If such an instruction was effective, there would be no reason for the opinion in Bryza in the first place. It is not believable that the issuance of the jury instruction blunted the impact of the introduction of the guilty pleas and erased the substance of those pleas from the mind of the jurors. Common sense simply dictates otherwise.

It is evident from the trial record that the intended defense strategy from the beginning and throughout the trial was to avoid the introduction of the guilty pleas. Every step taken by the defense was made to avoid the introduction of such evidence. The other reasons for the panel's decision, i.e. the McGrath/Davis cases and the jury instruction, are simply not sufficient to justify the tremendous prejudice suffered by the defense in the instant case because of the introduction of the guilty pleas.

Recently in United States v. Kroh, 896

F.2d 1524 (8th Cir. 1990), the Eighth Circuit Court of Appeals reversed a defendant's conspiracy and wire fraud convictions because a co-defendant's guilty plea had been admitted into evidence. In Kroh, the defense was defendant's lack of intent to defraud the alleged victim bankers.

The court in Kroh stated:

> We feel the wrongful admission of George's plea was overwhelmingly prejudicial and tainted the entire trial. The improperly admitted guilty plea not only affected the defendant's credibility with respect to the conspiracy charge, it severely impaired his defense on the remaining charges. The defendant vigorously disputed that he acted with intent to defraud banks and offered credible justifications that, without the detrimental impact of the guilty plea, may have created reasonable doubt in the minds of some jurors.

896 F.2d at 1532.

If the fundamental fairness of the reasoning in Kroh and Bryza is to have any force at all, it must be applied in this case. To act otherwise would be to vitiate these holdings, which are rooted in due process and

fundamental fairness and the concept that a person should be convicted on evidence related to him and not the disposition of cases related to others.

II. The Exclusion Of Defendant's State Of Mind Evidence

The most damning evidence of Sanders' alleged intent to defraud in addition to his co-defendants' guilty pleas was a tape-recorded phone conversation between him and co-defendant David Pelleu who was secretly cooperating with the government. In that phone conversation, four months after the alleged conspiracy ended, Sanders and Pelleu discussed a future plan similar although not identical to the scheme that Sanders was charged with. The tape recording was repeatedly played by the government throughout the trial and referred to in argument. The tape was played by the jury just moments before it returned a guilty verdict against

the defendant. The only evidence that rebutted the tape recording was testimony by Dewey of a conversation he had with Sanders shortly after Pelleu had called Sanders.

In the Dewey-Sanders telephone call, Sanders told Dewey that he had just received a call from Pelleu who was desperately seeking money; and that he, Sanders, played Pelleu along with a story and that Dewey should do the same in case Pelleu called him.[3/]

The district court relying upon United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1988), excluded Dewey's testimony about his call from Sanders holding that there was insufficient proof that the telephone call from Sanders to Dewey was contemporaneous

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3/ **VOIR DIRE EXAMINATION (OUTSIDE JURY'S PRESENCE)**

[BY MR. WEBB]:
Q. What did he [Sanders] say to you?

(continued on next page)

with the FBI tape recorded call which Pelleu had made to Sanders.

The panel in its opinion does not cite Jackson nor indicate that the district court ruled properly on this basis. Rather, it states:

3/ (continued)

[BY DAN DEWEY]:

A. The nature of the call was to inform me that Dave Pelleu had just called him and that I could expect a call from Pelleu that he was desperate for money and had called him for the same, and that I should expect to get a call shortly, no doubt, from him the same subject matter.

Q. Did he say anything to you about going along with what he said?

A. Well, he had just said that Pelleu had called and that he had put him off or given him a story of some kind, and that I should expect the same call and that Pelleu was, you know, just almost frantic.

Tr. 1371.

* * * *

[BY MR. DURKIN]:

Q. Sir, you don't know when or even if David Pelleu called Mr. Sanders; do you, from

(continued on next page)

> [A]ssuming arguendo that the testimony was within the state of mind exception, the testimony of Mr. Dewey was not the defendant's sole means of proving that he lacked the intent to defraud. In fact, Mr. Sanders produced several witnesses who testified that Mr. Sanders' intention was to hide assets from his ex-wife's divorce lawyer.

Slip Op. at p. 6.

The panel opinion narrows the holding in United States v. Peak, 856 F.2d at 825 (7th Cir. 1988), relied upon by defendant, wherein

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3/ (continued)

your own knowledge?

A. Of my own knowledge, no.
Q. And from the conversation itself, you don't know with any particularity when it was Pelleu talked to Sanders based on your conversation with him; do you? Maybe I am asking the same question.
A. Only the impression -- I got the impression that he had just called.
Q. But that's an impression.
A. Impression only. I didn't -- he did not state that Pelleu had called him at any specific time.
Q. All right.

Tr. 1372 (emphasis supplied).

the court, on similar facts involving rebuttal of a tape recording with state of mind evidence, found:

> [W]hen erroneously excluded evidence would have been the only or primary evidence in support of or in opposition to a claim or defense, its exclusion is deemed to have had a substantial effect on the jury.

856 F.2d at 825 (emphasis supplied). In the instant case, the prosecutor's claim was that Sanders had the intent to defraud. The "primary evidence" which the government conceded as its most potent evidence (Gvt's. App. Br. 37) to prove up the intent was the tape recording between Pelleu and Sanders. The only evidence available to defendant to rebut that primary evidence was the conversation between Sanders and Dewey. Judge Gordon's analysis that it was not the sole means of rebutting the claim ignores the alternative language in Peak which also makes it error to exclude the evidence which is the primary means by which to rebut a claim.

Further, and contrary to Judge Gordon's statement, Mr. Sanders did not produce any witnesses who testified that Mr. Sanders' intention was to hide assets from his ex-wife's divorce lawyer. The defense argued inferentially from the testimony of Sanders' divorce lawyer and also a brief comment by Dewey that he thought Sanders had a place to put losing trades, that this was the logical explanation for why Sanders did what he did. But neither Dewey nor the divorce lawyer testified that Sanders stated any specific intention to them. Their testimony on this point cannot under any circumstances be construed as rebutting the government's tape and was secondary in importance to the Dewey-Sanders' conversation on the intent to defraud defense.

The jury did not know when it heard and replayed the tape that Tom Sanders had a conversation with Dewey right after Pelleu called him in January 1987 and warned Dewey

that Pelleu had called and was desperate for money and that Dewey should, as Sanders did, give Pelleu a story and play him along. Sanders was precluded from arguing that the statements to Pelleu were a fiction, because the trial court did not permit the defense to introduce Dewey's testimony about his conversation with Sanders, which would have shown Sanders' state of mind at the time of his conversations with Pelleu.

If Peak is to be correctly applied to the facts of this case, and defendant is to have a fair trial, it must be recognized that the primary evidence in support of the government's claim of Sanders' intent to defraud was the tape recording. The only means by which to rebut that specific tape recording establishing the intent to defraud was the Sanders/Dewey conversation. The basis the district court used in precluding that conversation was not a proper basis and

the panel's opinion misapprehends the record in terms of the evidence presented by Sanders on this issue.

In Peak, the court stated that the state-of-mind evidence that was excluded tended:

> [T]o disprove the intent required for conviction [which] was vital to [the defendant]. Without it he had little chance of acquittal, with it he could have placed some doubt in jurors' minds as to his intent. There is a substantial difference between having some evidence and having no evidence to support a defense especially in light of the less than overwhelming evidence against [the defendant]. We therefore cannot say with any certainty that the evidentiary error had only a slight affect on the jury.

856 F.2d at 835.

As in Peak, the refusal of the Court in the instant case to permit Sanders to explain his state of mind when he talked to Pelleu and that he was just playing him along and giving him a story, prevented Sanders from defending the most crucial evidence presented in this case by the government. Without that

acquittal, with it he could have placed some doubt in jurors' minds as to his intent." Peak, supra, at 835.

CONCLUSION

If the guilty pleas had not been introduced and if Sanders had been allowed to introduce evidence rebutting the taped conversation, he would have had a fair trial where the jury could have considered all the evidence relative to him and reached a determination as to whether or not the evidence was sufficient beyond a reasonable doubt. This trial was not fair and because the principles of Bryza/Kroh and Peak were ignored, Mr. Sanders had no chance of an acquittal.

Respectfully submitted,

J. Samuel Tenenbaum

Attorney for Petitioner
Thompson B. Sanders

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-3274

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMPSON B. SANDERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88-CR-104—**Marvin E. Aspen**, *Judge.*

ARGUED SEPTEMBER 8, 1989—DECIDED JANUARY 5, 1990

Before CUMMINGS, POSNER, *Circuit Judges*, and GORDON, *Senior District Judge.*[1]

GORDON, *Senior District Judge.* Thompson Sanders seeks a reversal of his criminal conviction or, alternatively, a new trial. Pursuant to 28 U.S.C. § 1291, this court has jurisdiction to consider his appeal. We will affirm the defendant's conviction but will remand the case for the correction of the sentence.

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[1] Honorable Myron L. Gordon, Senior District Judge of the Eastern District of Wisconsin, is sitting by designation.

After the judgment of conviction had been entered, the district court discovered that it had illegally sentenced the defendant by imposing a sentence on count one which was greater than the statutory maximum; it then filed an order modifying the sentence. The problem is that the district court attempted to correct the sentence subsequent to the defendant's filing of his notice of appeal. Such filing divested the district court of its jurisdiction. *United States v. O'Connor*, 874 F.2d 483, 489 (7th Cir. 1989). Both sides agree that a remand is necessary to effect the correction of the sentence.

On February 9, 1988, a federal grand jury returned a six-count indictment against Mr. Sanders, a former Chicago Board of Trade member, and three co-defendants. On July 5, 1988, the grand jury returned a superseding indictment charging Mr. Sanders and the others in 11 counts. Count one charged Mr. Sanders with conspiring to commit wire fraud in violation of 18 U.S.C. § 1343 and conspiring to violate 7 U.S.C. §§ 6h and 13. Counts two through six charged Mr. Sanders with wire fraud in violation of 18 U.S.C. § 1343. Count seven charged him with interstate transportation of property taken by fraud in violation of 18 U.S.C. § 2314. Counts eight through eleven charged him with violating 7 U.S.C. §§ 6h and 13 by aiding and abetting a co-defendant's misrepresentation that the latter was an agent of a member of a contract market in handling an order.

Mr. Sanders denied his guilt as to all counts. Prior to trial, the co-defendants entered guilty pleas and testified against Mr. Sanders, and on September 14, 1988, a jury convicted him of all counts. The final judgment was entered on November 3, 1988; Mr. Sanders appeals therefrom, raising ten issues on appeal. He asserts that the first five points of error, when combined with one another, warrant reversal of his conviction and a new trial. Singly or allied, these first five claims of error do not justify a reversal. The remaining five contentions have been considered and must also be rejected.

I.

Mr. Sanders argues that the government prosecutors, in their closing arguments, impermissibly referred to Mr. Sanders' failure to testify. The following remark by the prosecutor is the first alleged violation of Mr. Sanders' fifth amendment protection:

> Both Dewey and Kolton testified they had an intent to deceive, to misrepresent, to lie. And Sanders said he had an—and, of course, Mr. Sanders they testified, they weren't sure what Mr. Sanders' intent was.

The district court, in denying the defendant's motion for a mistrial, characterized the statement as "inadvertent" and "unintentional."

The second alleged constitutional violation occurred in the government's rebuttal argument:

> Let me talk for something, about something, in my last minute here that we don't have in this case. We don't have the wig. We don't know where Mr. Sanders put it.

Mr. Sanders maintains that the two quoted statements add up to an inappropriate comment on Mr. Sanders' failure to testify. We disagree.

It is clear that both of these statements are, at most, singularly tangential, indirect references to the defendant's failure to testify. "[I]ndirect references to a defendant's silence at trial violate the Fifth Amendment only if the 'language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.' " *United States v. Perez*, 870 F.2d 1222, 1229 (7th Cir. 1989), *cert. denied, sub nom. Calderon-Abeja v. United States*, 110 S.Ct. 136 (1989), *quoting United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1300 (7th Cir. 1985). We are satisfied that the statements were not "manifestly intended" to be comments on Mr. Sanders' failure to testify, and accordingly the statements fail the first part of the standard.

Would the jury "naturally and necessarily" interpret the statements to be an observation about Mr. Sanders' silence? We conclude that a jury would not be led to such a conclusion. The remark about the wig is not of the same character as the comments made in *United States v. Hastings*, 660 F.2d 301, 303 (7th Cir. 1981), *rev'd* 461 U.S. 499 (1983), where the "prosecution alluded to the failure of the defendants to deny raping and kidnapping the three women." In the case at bar, the matters concerning the wig and how it was used were discussed throughout the trial. By the conclusion of the trial, the jury heard numerous references to the wig's absence. The prosecutor's statement that, "We don't know where Mr. Sanders put it" does not beg for an explanation *by the defendant* of the wig's whereabouts.

II.

The defendant claims as error the admission of the former co-defendants' guilty pleas during the government's case-in-chief. Given the trial strategy of the defense, the admission of such evidence was inevitable. Relying on the following admonition found in *United States v. Bryza*, 522 F.2d 414, 425 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976), the defendant asserts that the district court abused its discretion in admitting into evidence the guilty pleas of Mr. Sanders' former co-defendants:

> Normally the fact that co-defendants have entered guilty pleas has no place in another defendant's trial.
>
> Guilty pleas of co-defendants should be brought to the attention of the jury in only certain narrow instances; i.e., when it is used to impeach trial testimony or to reflect on a witness' credibility in accordance with the standard rules of evidence; where other co-defendants plead guilty during trial and are conspicuously absent; where opposing counsel has left the impression of unfairness which raises the issue or invites comment on the subject . . . .

Bryza at 425. (footnote omitted)

Bryza does not limit the admission of guilty pleas to the above-enumerated factual situations. As Chief Judge Bauer, the author of *Bryza*, recently wrote:

> Thus, to foreclose the possibility that the government had singled out [the defendant] for prosecution, while permitting his co-defendant to go free, the testimony at issue was properly elicited.

United States v. McGrath, 811 F.2d 1022, 1024 (7th Cir. 1987).

Another exception applies where the government seeks to "blunt the impact of cross examination and to avoid the impression that the government was concealing the information." *United States v. Davis*, 838 F.2d 909, 918 (7th Cir. 1988).

In both the district court and on appeal, the government argued that the admission was warranted under the *McGrath* exception. In that case, this court concluded that without testimony about the guilty plea, the jury would be left to infer that the former co-defendant went unpunished or that Mr. McGrath was singled out for prosecution. Relying on *McGrath*, the district court found the same to be true in the case at bar. Additionally, the district court submitted to the jury government instruction #18 which provided, in part: "Moreover, their guilty pleas are not to be considered as evidence against the defendant." While the admission of Mr. Sanders' co-defendants' guilty pleas may appear facially contrary to *Bryza*, the district court did not abuse its discretion in allowing the evidence.

III.

The defendant also claims that there was an error concerning an evidentiary ruling. On January 17, 1987, and March 4, 1987, co-conspirator Pelleu, while acting as a government informant, taped phone conversations that he had with Mr. Sanders. These phone conversations were admitted into evidence over the defendant's objection. As

part of his defense, Mr. Sanders made an offer of proof, through Mr. Dewey, that Mr. Sanders' state of mind at the time he made those statements was that he was "playing along" with Mr. Pelleu. Mr. Sanders argued that this evidence was admissible under the state of mind exception to the hearsay rule. After Mr. Dewey was questioned on this issue, the district court was unpersuaded that sufficient foundation had been laid for Mr. Dewey's testimony on the matter.

Notwithstanding the fact that the defendant failed to show that the state of mind exception applied, the defendant cites *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 499 (1988), in support of his position that the district court committed reversible error.

> An erroneous evidentiary ruling in a criminal case is reversible error only if it affects a party's substantial rights. Fed.R.Crim. P. 52(a); Fed.R.Evid. 103(a). The Supreme Court has interpreted this rule to require reversal only if "the error results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.' "

Peak at 834. (citations omitted)

The *Peak* court further stated: "When erroneously excluded evidence would have been the only or primary evidence in support of or in opposition to a claim or defense, its exclusion is deemed to have had a substantial effect on the jury." *Id.*

Assuming, *arguendo*, that the testimony was within the state of mind exception, the testimony of Mr. Dewey was not the defendant's sole means of proving that he lacked the intent to defraud. In fact, Mr. Sanders produced several witnesses who testified that Mr. Sanders' intention was to hide assets from his ex-wife's divorce lawyer.

IV.

These same tape recordings are the basis for the defendant's fourth point of error. Mr. Sanders charges that the government reneged on its promise not to introduce the tape recordings as evidence of prior bad acts and that the defendant relied on that promise to his detriment. The defendant does not claim, nor could he claim, that he did not receive adequate notice that the government intended to use the tapes as evidence against him. Indeed, the defense had ample access to the tapes at an early date. The thrust of the defendant's argument is that the district court should not have allowed the admission of the tapes into evidence because the government had not indicated to the defendant in a timely fashion that it intended to use the tapes as evidence of the defendant's prior bad acts. Rule 404(b), Federal Rules of Evidence. Previously, the government had submitted that it would seek the admission of the tapes under Rule 801(d)(2)(E) or Rule 801(d)(2), Federal Rules of Evidence.

The question before this court is whether the district court abused its discretion when it allowed the government to proceed with its Rule 404(b) evidence despite the fact that the government had not identified the tapes as evidence of prior bad acts. *See United States v. D'Antoni*, 856 F.2d 975, 984 (7th Cir. 1988). There is no constitutional right to discovery in a criminal case. *United States v. Napue*, 834 F.2d 1311, 1316 (7th Cir. 1987). Due process requires the government to disclose exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83; Rule 16, Federal Rules of Criminal Procedure, provides for the production of other evidence. However, the government is not required to pinpoint every aspect of its strategy. *United States v. Elam*, 678 F.2d 1234, 1253 (5th Cir. 1982).

While the government is expected to honor the positions previously taken with regard to discovery, it cannot be said that a change in plans will necessarily amount to harmful error. The district court's decision to admit the evidence may have required the defendant to shift

gears in the middle of trial, but it cannot be said that the ruling was an abuse of discretion. The district court, having had the benefit of both sides' written and oral submissions on the issue, concluded that Mr. Sanders was not prejudiced by surprise in that he had had ample notice of the existence and contents of the tapes. We agree.

V.

The fifth point of error addresses the manner in which the district court responded to the jury's request for certain items of evidence during its deliberations. The jury asked that the Pelleu/Sanders tapes be replayed. Also, they wanted partial transcripts of the Pelleu/Kolton/Dewey testimony. These requests came within minutes of each other. In the defendant's view, the jury's request for the partial transcripts was favorable to him while the request for the tapes was damaging to him. At the time that the jury transmitted its requests, the district judge was not available in person, but he instructed the marshal to play the tapes for the jury. After hearing the tapes, but before the partial transcripts were available, the jury informed the court that it had reached a verdict. Before accepting the verdict, the court offered the jury the opportunity to see the transcripts; the jury declined.

With the benefit of hindsight, it may have been better, arguably, to have submitted the requested material all at once. Nevertheless, we are persuaded that the district judge did not commit error, let alone reversible error, by invoking the above procedure.

VI.

Next, Mr. Sanders asserts that the government's allegations and proof were deficient on the wire fraud conspiracy charges. Specifically, he maintains that a violation of the wire fraud statute necessarily requires proof that someone actually lost money or property as a result of the scheme. This position is untenable. The aim of the mail and wire fraud statutes is to punish the scheme to

defraud rather than the end result. *United States v. Cosentino*, 869 F.2d 301, 307 (7th Cir. 1989), *cert. denied*, 109 S.Ct. 3220 (1989); *see also United States v. Dial*, 757 F.2d 163, 179 (7th Cir. 1985), *cert. denied*, 474 U.S. 838 (1985). The scheme developed by Mr. Sanders put the risk of loss on the brokers; such a plan is an actionable fraud under the wire fraud statute. "[I]t is fraud to impose an enormous risk of loss on one's employer through deliberate misrepresentations even if the risk does not materialize." *Id.*

VII.

Mr. Sanders maintains that the telephone communications alleged as part of the wire fraud charges did not facilitate the scheme as the calls were made after the trades. "[M]ailings and calls which occur after the defendant has obtained the victims' money are in furtherance of the scheme if they facilitate concealment or postpone investigation of the scheme." *United States v. Eckhardt*, 843 F.2d 989. 994 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 106 (1988), citing *United States v. Lane*, 474 U.S. 438 (1986); *see also, United States v. O'Connor*, 874 F.2d 483, 486 (7th Cir. 1989).

The fact that the government did not produce testimony regarding the contents of some of the charged calls is not fatal. The government's witness, the former co-defendant Daniel Dewey, testified that he would call Mr. Sanders after each trade to discuss the profitability of the trades. Mr. Dewey specifically related the subject matter of the call placed on May 25, 1988, but could not recall the exact contents of two of the later calls. Although the jury did not have before it the conversations, the jury could reasonably infer that the latter calls were similar in nature to the call on May 25, 1988.

VIII.

The next issue is whether the government's allegations and proof were deficient as to violations of the commodity

regulations for failure to allege and to prove that a false representation was made to a public customer in violation of 7 U.S.C. §§ 6h and 13.

We reject the defendant's position. Nothing in the plain language of § 6h requires that the representation be made to a "public customer." Further, the legislative history of the statute does not clearly establish that such was the intent of the act. In pertinent part, § 6h provides:

> It shall be unlawful for any person—(2) falsely to represent such person to be a member of a contract market, or the representative or agent of such member, . . . in soliciting or handling any order or contract for the purchase or sale of any commodity in interstate commerce or for future delivery, or falsely to represent in connection with the handling of any such order or contract that the same is to be or has been executed on, or by or through any member of, any contract market.

IX.

Mr. Sanders argues that there was insufficient evidence that Mr. Dewey "handled" an order as required by 7 U.S.C. § 6h. The term "handled" is a term of art in the commodities trading business. Both the prosecution and the defense produced "expert testimony" on the meaning of the term, and the jury was adequately instructed on the issue. We find no cause to disturb the jury's finding.

X.

Lastly, the defendant has challenged three of the district court's instructions to the jury. Mr. Sanders asserts that the district court improperly instructed the jury regarding the following matters: (a) on "handling", (b) on the wire fraud-related instructions; and (c) on the evidence of the guilty pleas. Each of these positions have already been addressed and rejected in other sections of this opinion.

Accordingly, the judgment of conviction is affirmed. The case is remanded to the district court for the correction of the sentence.

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